Congressional Research Service

MEMORANDUM June 4, 2013

To: House Energy and Commerce Committee
[redacted]

From: Linda Luther, Environmental Policy Analyst, [redacted]

Subject: **Response to Committee Questions on Coal Ash Recycling and Oversight Act of 2013**

This memorandum responds to your request that the Congressional Research Service (CRS) review and assess selected elements of the proposed Coal Ash Recycling and Oversight Act of 2013. The proposed bill would amend the Solid Waste Disposal Act—more commonly referred to as the Resource Conservation and Recovery Act of 1976 (RCRA; 42 U.S.C. §6901 et seq.). The proposed bill would add a new Section 4011, Management and Disposal of Coal Combustion Residuals, to Subtitle D of RCRA.

You asked CRS to review the proposed bill and answer the following questions as they pertain to the creation of a coal combustion residuals (CCR) permit program:

1. Would regulations applicable to CCR structures be required to meet a minimum federal "standard of protection"?
2. Would the bill explicitly authorize EPA to promulgate regulatory criteria or standards that would apply to structures that receive CCR?
3. What entities (EPA, states, or courts) would interpret any ambiguous directives that may be included in the proposed bill?
4. How would EPA oversight of state permit program implementation compare to its role in other permit programs created under Subtitle D of RCRA? For example, could EPA intervene and implement more stringent requirements if it determines a state is implementing regulations that EPA deems inadequate to protect human health and the environment from risks specific to CCR disposal?

A comprehensive answer to these questions would require the inclusion of background information regarding federal and state authorities, roles, and responsibilities in the development and implementation of requirements that apply to owners and operators of waste disposal facilities. In an effort to provide concise answers to the questions above and to comply with your deadline for our response, however, this memorandum does not provide comprehensive background potentially relevant to each question. Instead, it identifies selected background issues necessary to answer each question and discusses how states or EPA may interpret relevant provisions in the proposed bill, based on EPA and state interpretation of comparable directives in the past.

The proposed bill is similar to bills passed in the House and introduced in the Senate during the 112th Congress (as Title IV of H.R. 3409 and S. 3512). It would create a framework that states could use to

create permit programs for the "management and disposal" of coal combustion residuals (CCRs, also referred to generally as "coal ash"). If a state chooses not to implement a CCR permit program, or under certain circumstances specified in the bill, the Environmental Protection Agency (EPA) would be required to implement the permit program for that state.

Previously under RCRA, Congress has established a statutory framework within which EPA and states adopt and implement permit programs to ensure that owners and operators of certain types of waste disposal facilities operate in compliance with requirements that meet certain minimum federal standards. However, compared to the legislative approaches to creating those other permit programs under RCRA, the CCR permit program proposed in the draft bill would be created in a way that is unique within RCRA.

CRS Report R43003, *Analysis of Recent Proposals to Amend the Resource Conservation and Recovery Act (RCRA) to Create a Coal Combustion Residuals Permit Program*, by Linda Luther, James E. McCarthy, and James D. Werner provides analysis on the bill proposed during the 112th Congress. To the extent that analysis in that March 2013 CRS report includes information that may be useful in understanding provisions in the current bill, information in that report will be referenced in this memorandum, but not discussed in detail. While this memorandum provides preliminary policy analysis, it is not intended to provide legal analysis of the bill's provisions.[1] Further, as noted above, analysis of the current bill was prepared within the limited timeframe allowed.

Committee Questions

1. *Would regulations applicable to CCR structures be required to meet a minimum federal "standard of protection"?*

As the term is generally used to describe pollution control laws administered by EPA, a federal standard of protection refers to a baseline, federal level of protection established by Congress. The phrase "standard of protection" is used in this memorandum in its generally accepted sense to mean the performance standards to be achieved by compliance with regulations. For example, under RCRA Subtitle D, EPA was required to revise sanitary landfill criteria (at 40 C.F.R. Part 257) to apply to "facilities that may receive hazardous household wastes." Congress explicitly required EPA to promulgate criteria that would be

> [those] necessary to protect human health and the environment and may take into account the practicable capability of such facilities. At a minimum such revisions for facilities potentially receiving such wastes should require ground water monitoring as necessary to detect contamination, establish criteria for the acceptable location of new or existing facilities, and provide for corrective action as appropriate.[2]

That explicit directive to EPA established the "federal standard of protection" for municipal solid waste (MSW) landfills. In response to that directive, EPA established minimum national criteria, applicable to all owners and operators of MSW landfills (at 40 C.F.R. Part 258), to ensure protection of human health and the environment. Further, minimum national criteria[3] necessary to achieve the federal standard of protection have been determined during the federal rulemaking process.

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[1] For legal analysis, contact the CRS American Law Division, at 7-6006.

[2] 42 U.S.C. §6949a(c)(1).

[3] In general practice, the term, "minimum national criteria" has also been referred to as "federal performance standards" or "minimum national standards."

In June 2010, EPA issued a proposed rulemaking that includes two options to regulate CCRs pursuant to its current authorities to regulate hazardous wastes under RCRA Subtitle C; and wastes explicitly exempt from the hazardous waste requirements, under RCRA Subtitle D.[4] EPA is currently undertaking its proposed rulemaking—that is, its process to determine criteria necessary to protect human health and the environment from risks specific to the management of CCR (i.e., its placement on land in landfills and surface impoundments).[5] EPA's current rulemaking is potentially relevant to state efforts to regulate CCR for two reasons. First, information and data provided in the preamble provide information about risks that have been tied to improper CCR management (i.e., disposal methods shown to allow toxic contaminants in the waste to find a pathway of exposure to humans above levels determined to be toxic). Second, the proposal includes regulatory standards that EPA has identified to-date that it believes would protect human health from the risks identified.

The introductory statement in the bill proposed for markup states that the bill amends Subtitle D "to encourage recovery and beneficial use of coal combustion residuals and establish requirements for the proper management and disposal of coal combustion residuals that are protective of human health and the environment." Within the bill itself, requirements that would be established for the management of CCR are found primarily under proposed Section 4011(c), "Requirements for a Coal Combustion Residuals Permit Program." Those requirements list a subset of MSW landfill criteria and several "general requirements" that state agencies implementing the permit program established pursuant to the legislation must apply to "structures." Structures would be defined broadly as a landfill, surface impoundment, or other land-based unit that receives CCR (see proposed Section 4011(j)(7)).

By specifying in federal law requirements that must be applied by the permit program, such requirements could be considered what has been referred to as "minimum federal requirements" applicable to the state CCR *permit program*. However, neither those minimum permit program requirements nor any other provision in the bill explicitly requires agencies implementing the permit program to establish criteria applicable to CCR structures that will be those necessary to achieve a specific federal standard of protection. Further, EPA is not directed to promulgate regulations that could be interpreted as minimum national (i.e., federal) criteria applicable to CCR management.[6]

If promulgated in accordance with existing state solid waste management laws, regulations applicable to CCR structures may be required to meet standards of protection as determined by each state, in accordance with that state's interpretation of potential risk to human health from CCR disposal. The degree to which a state program may protect human health from risks specific to CCR disposal would not be known until individual states begin to interpret the directive in proposed Section 4011 and to promulgate regulations according to individual state interpretation. That is, the CCR permit program may result in the implementation of requirements that meet individual state-determined standards of protection. Some argue that section 4011(c) provides minimum national standards to guide state permit

[4] U.S. EPA, "Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities," 75 *Federal Register* 35128-35264, June 21, 2010.

[5] For information on the process EPA has used to establish criteria necessary to meet a federal standard of protection, including the process that EPA is currently undertaking to identify potential risks and protective measures necessary to address the risks associated with the management of CCR, see the March 2013 CRS report, specifically the sections "Existing Standards Relevant to a CCR Permit Program" and "Appendix A. Selected Authorities and Directives in RCRA Relevant to CCR Management," including particularly "Determining Criteria Necessary to 'Protect Human Health and the Environment' Under RCRA."

[6] Under certain conditions, EPA may be required to implement a state's permit program. See discussion under question 4 and the March 2013 CRS report, specifically the section "A 'CCR Permit Program' Compared to State Programs to Regulate MSW Landfills: EPA's Role."

programs, while others have observed that the bill neither provides an explicit standard of protection, nor an explicit requirement that state programs meet such a standard, as previously outlined in RCRA.

2. *Would the bill explicitly authorize EPA to promulgate regulatory criteria or standards that would apply to structures that receive CCR?*

Like the bills proposed in the 112th Congress, the bill proposed for markup includes no explicit mandate to EPA, or to states, to promulgate regulations applicable to structures that receive CCR.[7] Instead, agencies implementing the permit program, presumably individual state agencies, would be required to apply requirements in proposed Section 4011(c) to CCR structures. Those program preconditions arguably imply that states would promulgate regulations applicable to owners and operators of CCR structures. State regulations that would ultimately apply to regulated CCR structures would depend on each state's interpretation of the criteria listed among the proposed permit program requirements (though EPA and possibly court review would impose a check on unreasonable state interpretations).

EPA would appear to have no formal role in establishing criteria that states may adopt and apply to CCR structures or in assisting states in their interpretation of program requirements in Section 4011(c), but could potentially issue guidance to assist states or provide states with technical assistance, if states request such assistance. (Additional conditions under which EPA could potentially promulgate regulations or requirements applicable to the CCR permit program are included in the answer to question 4, below.)

3. *What entities (EPA, states, or courts) would interpret any ambiguous directives that may be included in the proposed bill?*

In general, under other pollution control laws administered by EPA, ambiguities in statutory requirements would be subject initially to EPA interpretation—generally within the framework of the formal administrative rulemaking process and agency guidance. Disagreements among interested parties (e.g., environmental organizations, regulated industry, or state or local implementing agencies) and EPA regarding the agency's final interpretation of statutory requirements could potentially be subject to court interpretation.

Under the proposed bill, it would be states, rather than EPA, that would have primary authority to promulgate regulations applicable to CCR structures and implement requirements applicable to regulated entities. Any ambiguities or requirements not explicitly included in the proposed bill would be subject to state (and potentially court) interpretation. For example, criteria that must be applied to CCR structures using a CCR permit program include selected MSW landfill criteria—primarily the technical criteria such as operational and design criteria and groundwater monitoring requirements. However, the MSW landfill criteria listed among the program specifications included in the draft bill do not include requirements comparable to "general" standards in the MSW landfill regulatory criteria.[8] Those general standards define program "applicability." Under the structure of the proposed bill, states would likely include program elements necessary to implement the program based on their interpretation of required program elements. As a result, it may be anticipated that such criteria could vary somewhat from state to state.

EPA may interpret ambiguities in the law by issuing technical guidance, but it is not required by the legislation to do so. However, until EPA interprets, via regulation or guidance, particular elements of

[7] See the March 2013 CRS report, specifically the section "Provisions Relevant to Potential State CCR Permit Programs." Also, see discussion under question 4 regarding the potential for EPA to use its broad authority in RCRA to prescribe regulations as necessary to carry out its function under the law.

[8] See 40 C.F.R. Part 258, Subpart A.

Section 4011, it cannot be determined whether or on which program elements EPA may issue such guidance.

4. *How would EPA oversight of state permit program implementation compare to its role in other permit programs created under Subtitle D of RCRA? Could EPA intervene and implement more stringent requirements if it determines a state is implementing regulations that are not adequate to protect human health and the environment from risks specific to CCR disposal?*

For other permit programs created under RCRA, EPA has been required to authorize or approve state programs based on EPA's determination that such programs were adequate to ensure facility compliance with federal performance standards. For example, with regard to state programs to implement the MSW landfill criteria, EPA was explicitly required to determine whether states adopted a program "adequate" to ensure facility compliance with the criteria that would protect human health and the environment from risks specific to MSW disposal in landfills; and authorized to directly enforce those federal criteria at facilities in states with inadequate permit programs.[9]

In the bill proposed for markup, EPA's role in program oversight is similar to its role in the bills proposed in the 112th Congress.[10] In the draft bill, EPA would have no formal role in state adoption and implementation of regulations established pursuant to requirements in Section 4011(c) (i.e., state program *development*). However, under proposed Section 4011(d), "Federal Review of State Permit Programs," EPA would have a limited role in reviewing state programs to identify certain program "deficiencies" at various milestones in the program implementation process. Specific elements of the program that EPA would be required to identify as potentially deficient are explicitly listed in the proposed bill (an element that was not included in the previously-proposed bills).[11] Included among those elements would be a determination of whether the permit program meets requirements in proposed Section 4011(c) or whether the state failed to issue permits (as required under Section 4011(c)) or to act on permit violations.

Among the program elements that EPA would be required to evaluate for a potential deficiency, EPA would not be explicitly required to determine whether state regulations applicable to CCR management achieve a minimum standard of protection. For example, EPA may determine that, based on a state's definition of a landfill, surface impoundment, land-based unit, regulations implemented by that state did not protect human health and the environment.[12] EPA would not be required to include that determination among potential program deficiencies. However, a full understanding of how EPA may interpret its mandate to identify program deficiencies may not be evident until EPA interprets its responsibilities delineated in the proposed bill.

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[9] The directive to EPA to determine program adequacy is provided at 42 U.S.C. §6945(c)(1)(C); required elements of state programs that EPA is required to deem adequate are provided at 42 U.S.C. §6945(c)(1)(B).

[10] See the March 2013 CRS report, specifically the sections "EPA's Potential Role in Program Oversight and Implementation" and "A 'CCR Permit Program' Compared to State Programs to Regulate MSW Landfills: EPA's Role."

[11] See proposed Subsection 4011(d)(4).

[12] In its June 2010 proposal to regulate CCR, EPA defined "landfills" to include large scale fill operations, based on findings in EPA groundwater risk assessment and its documentation of damage cases related to CCR management in such units (see discussion at 75 *Federal Register* 35147. As noted previously, the definition of CCR structures includes "other land-based units." However, more detailed definition of what constitutes such structures would not be known until states define a structure. For discussion of the potential relevance of this issue, see the March 2013 CRS report, specifically the section "A 'CCR Permit Program' Compared to State Programs to Regulate MSW Landfills: Flexibility."

EPA's potential authority to implement a state permit program is delineated primarily in provisions in proposed Section 4011(e), "Implementation by Administrator." That section lists three conditions under which EPA would be required to implement a permit program for a state—two would be at the state's discretion (those conditions are not discussed in this memorandum). A third condition would be if EPA determined that the state failed to remedy a deficiency by the deadline negotiated with the state.[13]

The conditions under which EPA may intervene and implement a CCR permit program are listed in a provision entitled "Federal Backstop Authority."[14] With regard to federal pollution control laws administered by EPA, reference to a federal backstop has generally referred to conditions under which EPA could step in and establish or enforce federal performance standards if EPA determined that a state, authorized or approved by EPA to implement federal standards, did not do so in a way that met the required baseline federal standard of protection specified in law.[15]

As it would be used in the proposed bill, the term backstop authority would refer to conditions under which EPA may intervene and implement a program that would be unique in RCRA. That is, while the provisions do specify conditions under which EPA may be required to implement a state program, it would authorize EPA to do so when or if the agency determined that a state program was deficient in meeting specific statutory requirements (as specified in proposed Subsection 4011(d)(4)), not necessarily deficient in implementing criteria that would achieve a particular level of protection.

RCRA currently provides EPA with broad authority to prescribe regulations as necessary to carry out its function under the law.[16] Pursuant to directives to EPA in proposed Subsections 4011(d) and (e), EPA may promulgate requirements applicable to its process for reviewing state programs, identifying program deficiencies, and possibly implementing state permit programs (e.g., by promulgating regulations EPA would implement if required to do so, based on EPA's interpretation of proposed Section 4011(c) requirements). However, until EPA interprets those statutory directives and, possibly, promulgates requirements detailing how it would meet those requirements, more specific conditions under which EPA would intervene and attempt to enforce a state permit program may not be known.

To reiterate, the foregoing have been general observations on selected questions regarding the draft bill. Differences between the bill's approach and regulatory approaches contained in other laws were identified. More comprehensive and precise treatment of those issues requires legal analysis. Furthermore, rulemaking and issuance of guidance from EPA as provided for in the draft bill may clarify the respective roles of EPA and the states.

I hope this information is useful. If you have further questions, please contact me a[redacted]

[13] See proposed Subsection 4011(d)(3)(B).

[14] See proposed in Subsection 4011(e)(1).

[15] The term "backstop authority" is not formally defined in federal statute or regulation, therefore whether EPA is described as having "backstop authority" or not has no legal consequence. Nonetheless, the term has been widely used to refer to explicit authority provided to EPA to enforce standards at individual facilities in a state authorized by EPA to implement and enforce federal standards. Reference to EPA backstop authority has been made with regard to RCRA, the Clean Air Act, and the Clean Water Act. For example, under RCRA Subtitle C (42 U.S.C. §6928(a)), EPA is authorized to enforce standards of performance at individual facilities in a state even after the agency has authorized the state to implement and enforce such standards. Section 111(c) of the Clean Air Act (42 U.S.C. §7411(c)) provides EPA with comparable enforcement authority.

[16] 42 U.S.C. §6912(a)(1).